

***United States Court of Appeals
for the Second Circuit***



**BRIEF FOR
APPELLANT**

original
76-1420

In The
United States Court of Appeals
For The Second Circuit

UNITED STATES OF AMERICA,

Appellee

vs.

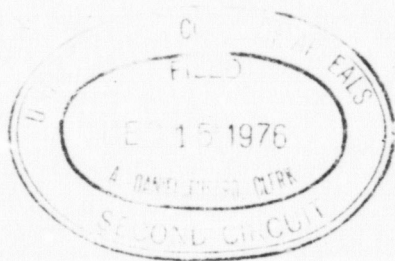
KENNETH RAYMOND CHIN and ELIZABETH JANE
YOUNG, a k a ELIZABETH JANE YOUNG CHIN,

Appellants.

*On Appeal from the United States District Court for the Eastern
District of New York.*

**BRIEF FOR APPELLANT
KENNETH RAYMOND CHIN**

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UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

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UNITED STATES OF AMERICA,

Appellee,

- against -

KENNETH RAYMOND CHIN and
ELIZABETH JANE YOUNG, a.k.a.
ELIZABETH JANE YOUNG CHIN,

Appellants.

- - - - - X

ON APPEAL FROM THE UNITED STATES DISTRICT
COURT FOR THE EASTERN DISTRICT OF NEW YORK

BRIEF ON APPEAL FOR
KENNETH RAYMOND CHIN

PRELIMINARY STATEMENT

Kenneth Chin appeals from judgment of conviction entered after jury trial by Chief Judge Jacob Mishler in the United States District Court, Eastern District of New York. Of eight counts originally lodged against defendant Chin, all charging violation of Title 18 U.S.C. §922(a)(3) and Title 18, U.S.C. §2, four resulted in

verdicts of acquittal, two were dismissed by the Trial Court pursuant to motion under F.R.C.P. 29, and two remain. The remaining counts charge Chin with transportation and receipt of a firearm into and in the state of residence by a person who obtained them outside the state.

ISSUES PRESENTED

1. Whether there is sufficient evidence on the record to sustain the conviction of Chin for transportation of the firearm under Count I.

The Trial Court denied Chin's motions to dismiss at the end of the government's case, and pursuant to F.R.C.P. 29 at time of sentencing.

- a. There was insufficient evidence of Chin's possession of the weapon.
 - b. The Trial Court erred in charging that the inference of participation can be drawn from possession, and that the inference was sufficient to sustain the conviction of transportation. In addition, there was insufficient evidence to sustain a finding of aiding and abetting in the transportation.
2.
 - a. Whether the Trial Court erred in omitting from its charge elements of the crime contained in the statute defining receipt of the weapon.
 - b. Whether there is sufficient evidence in the record to sustain the conviction on receipt.
 3. Whether the Trial Court erred in its definition of residence and the essential components of aiding and abetting.

4. Defendant Chin respectfully joins in Point of Young's brief, which questions the legality of the search conducted on October 4, 1975.

FACTS

The Indictment is founded upon the Firearms Control Act passed by Congress to control illegal transportation of firearms. Three of the four weapons which formed the basis of the Indictment were found on October 4, 1975 in an apartment¹ leased by defendants Chin and Young (Tr. 94-99, 316). The fourth weapon had been placed by them, for repair, in Marty's Gun Store, Washingtonville, New York.

With reference to the first two counts, the subject firearm, an Armalite AR-180 had been purchased in California, on July 29, 1975, by defendant Young (Tr. 105-106). At the time of the purchase, Young was accompanied by a male Oriental; that person was not Chin, the uncontraverted evidence being that he was in New York on that date (Tr. 123, 463-474, Def. Exh. I). Both defendants were convicted of transporting this weapon; Chin was additionally convicted of receiving this firearm.

The firearm forming the basis of Counts 3 and 4 of the Indictment was an Armalite AR-180, S-12590, purchased in California on August 12, 1975 by one Marc Kondo (Tr. 120-121). The only connection between Kondo and the defendants was that

¹ Tr. references are to the transcript, "A" references are to the appendix).

his name and a California address appeared in an address book found in the bedroom closet of the apartment during the October 4 search (Tr. 186-194).

The jury convicted both defendants of Count 3, and defendant Chin of Count 4; these convictions were set aside by the Trial Court at the time of sentencing.

Evidence supporting the fourth through eight counts consisted of the appearance of one, Michael Yanagita's name and California address in the address book (Tr. 194) and introduction into evidence of two "disposition slips" indicating that Chin purchased the two remaining weapons from Yanagita. However, the evidence of the disposition slips was admitted "only on the issue of residency" (Tr. 371) and therefore was incompetent to form the basis of a conviction. This issue is moot for the jury acquitted defendants on these counts.

The remainder of the proof consisted of efforts to prove and disprove the government's contention that Young and Chin were at the time of the acquisition of the weapons residents of New York State. As the trial developed, it became apparent that Chin was not seriously disputing the issue of his residence, introducing records which proved that he had been in New York at all relevant times. (Tr. 463-474).

The Government introduced evidence of postal records indicating that Chin and Young's mailing address was 925 Union Street (Tr. 198-236); the apartment lease (Tr. 312-320) and a note from Young to the manager of the building dated December 31, 1974 stating "We look forward to a continued good relationship in the new year." (Tr. 322); utility records reflecting accounts for that apartment in the name of Young (Tr. 346-401); telephone records indicating a telephone installation at the address in the name of E. Young (Tr. 396).

Further proof indicated that Young completed a firearm permit application on July 1, 1975 setting forth the Brooklyn address (Tr. 425). Three documents were introduced from the files of the City of New York Firearms Control Board. Two disposition slips, one dated July 15, 1975 and the other dated August 25, 1975, showing the name of Kenneth Chin, address, 925 Union Street; a voucher affidavit of good character dated January 7, 1975, completed by Elizabeth Young, containing the statement that she resided at 925 Union Street (Tr. 374).

The defense introduced testimony showing that Young travelled home to her parents' house in California in July of 1975 (Tr. 497). Her father was allowed to testify that

his daughter told him that she was coming to California to live there (Tr. 503) but the Court disallowed other evidence tending to support the permanence of the California trip (Tr. 500). The defendant's father received mail for his daughter at the Hanford, California address (Tr. 504).

On cross-examination, it was elicited from Mr. Young that pursuant to Chinese tradition, until a female child marries, the home of her parents remains her home (Tr. 516).

POINT I

THE EVIDENCE IS INSUFFICIENT
TO SUSTAIN CHIN'S CONVICTION
OF TRANSPORTATION OF THE
WEAPON IN VIOLATION OF
18 U.S.C. §922(a)(3).

Count I of the Indictment alleges the crime of transportation of a firearm under Title 18 U.S.C. §922(a)(3).

This section makes it a crime for a person to transport into the state of his or her residence a firearm obtained by that person in another state. The gravamen is the transportation of a weapon under the circumstances defined in the section; mere possession of a firearm so transported is not criminal.

Eight counts were contained in the Indictment; the first, third, fifth and seventh counts charged transportation of four weapons; the even-numbered counts alleged receipt of the same weapons. An Armalite AR-180 Serial #12585, formed

the basis of Count I. Chin was convicted of aiding and abetting the transportation of this firearm.

a. Evidence of Chin's possession

The Government adduced two facts with respect to the weapon in this first Count: 1) The firearm was obtained in California on July 29, 1975 by a person identified as Young, shown through the testimony of Carl Copeland, Jr. (Tr.105-110); 2) The firearm was found in an apartment over which Young and Chin had joint control. This was shown through the testimony of Agent McCool, (Tr. 91-103) and through documentary evidence indicating that defendants signed an apartment lease as joint tenants (Tr. 312-317).

This is the sum total of evidence introduced about this weapon, or tending to connect defendant Chin with the weapon. The location of the weapon within the apartment was never pinpointed, nor was any prior or subsequent connection made between Chin and this weapon, by way of registration or otherwise. Furthermore, it was proven by the defendant, conceded by the Government and found by the Court that Chin was in New York on July 29, 1975, working at his place of employment (Tr. 463-474, Exh. I, Tr. 641, [summation of Government] A-89a [charge to the jury]). Therefore, both as a finding

of fact and as a matter of law, the acquisition of the firearm by Young provides no basis upon which to inculcate Chin.

Chin's conviction rests solely upon the proof of joint possession of the apartment in which the firearm was found. The Court charged the jury that if they found possession of the firearm, they could infer from this fact participation in the transportation and that this inference would be sufficient to find guilt beyond a reasonable doubt. (A-97).

It was error, under the circumstances, to charge that this inference could be drawn, inasmuch as the evidence fails to support a conviction as a matter of law.

Before reaching the question of the propriety of the Court's charge that the inference of participation in the transportation can be drawn from proof of possession, the threshold problem of whether there was sufficient evidence of Chin's possession of the firearm must be considered. If there was insufficient evidence of possession of the firearm, the basis of the inference is swept away, and with it the conviction.

Proof of Possession of an item, be it joint, exclusive, actual or constructive, requires some indicia of dominion and control (A-97). A nexus must be shown between the

alleged possessor and the item possessed. United States v. Scarborough, 539 F. 2d 331 (Cir. 1976). It is interesting that the Trial Court relied upon United States v. Craven to justify its charge on the inferences to be drawn from possession, as that case also sets forth the principle that possession of a residence is insufficient to establish possession of all of the contents thereof. United States v. Craven, 478 F. 2d 1329, 1333 (6th Cir. 1973). The location of the items within the residence are relevant to the issue of possession, and can be such as to show possession by a particular person. Thus, in Scarborough, the Court found that discovery of one weapon under the bed of defendant and another three feet away from the bed provided a sufficient nexus connecting defendant with the weapons. United States v. Scarborough, supra at n. 10. In Craven, the Government was found to have shown "much more" than mere possession of the residence, there being testimony that the defendant had been seen previously in the house with the firearm, and statements by defendant himself about the weapon, as well as evidence that he slept in the room in which the weapon was found. United States v. Craven, 478 F. 2d supra at 1334. In the facts at bar, there is absolutely no evidence, other than

possession of the apartment, tending to provide a nexus between Chin and this particular weapon.

There was no testimony placing the location of the gun in a portion of the apartment controlled by Chin, nor was there any indication that the weapon was, or was not, secreted or in open view. In fact, there was no evidence presented as to where this particular gun was found within the apartment.

The Government might argue that it provided the essential nexus by proof of Chin's interest in hunting and his possession of other weapons. However, "[w]here two persons share occupancy of a room and the right to exclude others, either or both of them may have knowing dominion and control over particular chattel, depending on the circumstances, and the choice between them must be based on more than speculation." United States v. Bonham, 477 F. 2d 1137, (3 Cir. 1973). From the fact of possession of the apartment, any possessory connection between Chin and this particular weapon is gross speculation. An examination of all the evidence regarding this particular weapon makes obvious that the Government's contention that Chin possessed the weapon is contrary to the weight of the evidence.

The Government showed that Young, the person with

whom Chin jointly possessed the apartment, was the person who obtained the firearm (Tr. 106). The evidence showed that Young manifested an intent to possess a firearm by permit application therefor (Tr. 425). No evidence relates the weapon to Chin. The predicate, upon which the Court constructed the inference it deemed sufficient to allow a conviction of Chin for this crime, does not exist in the record.

b. Inferences to be drawn from possession

Assuming, arguendo, that this Court finds sufficient evidence to sustain a finding of possession, the conviction must yield to the following argument. Firstly, the Court erred in allowing the jury to draw the inference of participation from possession. Secondly, not only was there insufficient evidence to sustain a conviction for aiding and abetting in the transportation of this weapon, there was no evidence of Chin's involvement in this crime.

The jury was charged that if it found Chin to be in possession of the weapon, it might "infer from that possession that the defendant Chin participated in the transportation of that weapon." (A-99). Such charge is contrary to law, contrary to logic and contrary to the facts.

In United States v. Tavoularis, this Court stated that an inference

"relied on to establish an element of a crime will be rejected as violative of due process 'unless it can at least be said with substantial assurance that the presumed fact is more likely than not to flow from the proved fact on which it is made to depend' Leary v. United States, 395 U.S. 6, 36, 89 S. Ct. 1532, 1548, 23 L. Ed. 2d 57 (1969)"

United States v. Tavoularis, 515 F. 2d 1070, n. 10 (2d Cir. 1975). Under consideration in Tavoularis was the question of whether the inferences permissibly drawn from possession of stolen property included participation in the theft. Declining to decide the issue in the abstract, this Court held that under the facts as presented, application of the inference would "verge on the irrational."

The Trial Court herein not only accepted that inference, but applied it to facts which render the inference absurd, and to a crime which differs so from the crimes involving stolen property that the inference is, in the abstract, violative of due process. Inferences are founded in reason. The inference of knowledge flowing from possession of recently stolen property is predicated on the nature of the items possessed.

The inference of guilt flows from the fact that the goods were stolen, i.e., contraband. It is rational and comports with human experience to conclude that contraband is not generally obtained in an innocent manner. Therefore inferences of guilty knowledge are supportable from possession and the further inference of participation in the theft might likewise be supported. The same logic which allows such conclusion in the case of stolen goods, prevents similar conclusions where, as here, there is nothing in the nature of the item possessed on which to predicate any guilty inference. Possession of a firearm is not per se possession of contraband. Therefore, what factor of the possession leads to the inference of guilt?

The Trial Court based its use of this inference on the decision in United States v. Craven, which held that the inference of receipt from proof of possession is sufficient to sustain a conviction under 18 U.S.C. § 922 (h) (1). Acceptance of this principle does not resolve the issue presented herein. To infer receipt from possession is to accept the logical premise that one who possesses something

either manufactured it, or, at some point, received it. One cannot, however, say, with the same assurance, that one who possesses an item has knowledge of the circumstances of its previous transportation. With even less assurance can it be said that one in possession of an item assisted in its previous transportation. The inference of participation in a prior crime from the possession of non-contraband, does not satisfy the "more likely than not" due process standards.

The viability of an inferential conclusion in any case must be determined by measuring the inference against the other evidence presented. Thus, with reference to the inferences drawn from possession of stolen property, one of the factors used to determine the propriety of charging permissible inferences is that the possession be "unexplained." Barnes v. United States, 412 U.S. 837, 845 (1973). In Tavoularis, the circumstances surrounding the possession were such as to negate any inference that the defendants knew the bonds were stolen from a bank. Here, the circumstances negate the inference as to Chin, thereby requiring the Government to adduce other proof of his participation.

The explanation of Chin's possession of the weapon is that Young brought the gun into New York, and into the

apartment.² As has been discussed above, the Government showed, if anything, that Young purchased the firearm and possessed it in California. Three months later, the weapon was found in an apartment under the joint control of Chin and Young. The inference that Young transported the weapon may well be justified on these facts. Any attempt to implicate Chin must fail.

To infer Chin's participation from the evidence would allow a conviction based, not only on an illogical inference, but upon nothing more than association with another person and proximity to the subject matter of the alleged criminal act. Criminal culpability requires more. Criminal liability of an accomplice is predicated upon his conscious, active assistance in the commission of a crime. United States v. Dickerson, 508 F. 2d 1216 (2d Cir. 1975), 18 U.S.C. §2. Submission of such charge to the jury is warranted "only if there is enough evidence to show that he knew of such activity of the principal

² This, of course, does not constitute proof of Young's guilt for the mere transportation of the weapon is not criminal. The Government had to prove beyond a reasonable doubt that Young met the residential criteria of the statute in order to convict. This issue of residency was vehemently contested by Young.

and desired to forward it.³ United States v. Docherty, 468 F. 2d 989 (2d Cir. 1972). All of the Government's evidence points away from Chin. Absent proof showing that Chin had prior knowledge of the acquisition of the gun, that he knew Young was going to purchase it, that he helped her to obtain it, that he helped her to transport it, or that he even knew it was in the apartment, the conviction cannot stand. Of course, none of the foregoing was proven, nor even attempted to be proven.

Further exculpation of Chin is found in the nature of the defense presented by Young to the jury. She did not attempt to show that she acted under the influence of, or under duress by or in league with Chin. Defendant Young, in summation, did not disclaim acquisition or possession, although she did not concede these issues (Tr. 674). The thrust of her defense was directed at showing she had abandoned her

³ The principles of accessorial culpability set forth in United States v. Pinkerton 328 U.S. 640 (1946) are inapposite here as defendant Young was previously acquitted of conspiracy. She was initially tried, Chin having been severed, on an Indictment, charging both defendants in conspiracy count and one count under §922(a)(3). The jury was unable to agree on the substantive count. Thereafter, the Government superceded the original one-count Indictment with this multi-count Indictment.

Brooklyn residence at the time of the acquisition* (Tr. 675).

The final test of this inference, even if permissibly drawn under the circumstances of this case, is whether it is strong enough to constitute proof beyond a reasonable doubt.

The Trial Court charged the jury that

"There is no evidence, as I said before, that the defendant Chin in any way participated in the transportation of any of the weapons into the State of New York."

(A-96)

Then, reciting the fact of discovery of the weapons in the apartment and defining possession, the Court continued:

"If you find from the evidence in this case beyond a reasonable doubt that the weapons made the subject of the counts in this Indictment were in the knowing possession of the defendants and...if you find that the weapons were brought into the State of New York from outside the State of

* Chin most respectfully refers this Court specifically to the point in Young's brief relating to the error of the Trial Court in refusing to allow evidence as to the reason for Young's leaving New York and going to California. The inability of Young to show her state of mind at the time was highly detrimental to Chin as such testimony would have provided further proof of the non-involvement of Chin the acts of Young at the time.

New York, then you may infer from your finding of possession that the accused participated in the unlawful transportation."

(A-98-99)

The inference, therefore, formed the entire basis upon which the jury could find guilt and thus it must be of sufficient strength to constitute proof beyond a reasonable doubt.

cf. United States v. Tavoularis supra at no. 11. Borrowing the words of the Trial Court:

"Proof beyond a reasonable doubt is therefore proof of such convincing character that you would be willing to rely and act upon it unhesitatingly in the most important and weighty of your own affairs."

(A-68)

The inference of guilty knowledge as drawn from possession of stolen goods may be sufficient to constitute proof beyond a reasonable doubt, Barnes v. United States, supra, and the Court may find the inference of knowledge here may be likewise sufficient to meet this burden. But this defendant was convicted of aiding and abetting the transportation -- not mere possession. Possession of this weapon cannot be characterized as guilty, inasmuch as possession of this particular item is not per se a crime. Neither in the abstract, nor upon application of the facts adduced at this trial can

it be said that any inference drawn from defendant's purported possession of the weapon would be sufficient to constitute proof beyond a reasonable doubt.

Guilt in our system of law is wholly personal. One is punished for one's acts or failures to act. Chin has been convicted of a crime, absent proof of his involvement therein, based upon a prosecution which attempted to rely on inferences to provide the vital elements of participation and knowledge. Although the prior argument was based upon the misapplication of the law of inferences in criminal prosecutions, it appears that the Government has applied an unspoken inference to convict Chin: Chin is a hunting enthusiast, therefore he must be guilty, or, he was there -- he must be guilty. This reasoning violates one of our most cherished protections, that mere presence is insufficient to prove guilt. With this in mind, one can imagine many theories in which the jury could speculate and justify the conviction. Hunting and weaponry are masculine endeavors, therefore Young must have obtained the gun for Chin's use in these masculine endeavors.

It is pertinent at this juncture to point out that if the sexes of the defendants had been reversed, it would be most unlikely to conclude that Young (male) transported and obtained the item for the use of Chin (female). Inherent

in this thought is the unspoken inference that the woman is controlled by the man. The conviction is therefore based on supposition, speculation and conjecture, rather than on hard evidence.

POINT II

THERE WAS INSUFFICIENT EVIDENCE TO SUSTAIN THE CONVICTION OF CHIN FOR RECEIVING. THE COURT ERRED IN ITS CHARGE OF THIS CRIME.

The second count of the Indictment charged Chin with receiving a firearm "which had been transported by them, after it had been purchased (sic) or otherwise obtained by them in California." An elemental analysis of the statute upon which this charge was based reveals that Congress has declared that the following conduct is criminal:

1. Receipt
2. In the state where he resides
3. Of any firearm
4. Purchased or otherwise obtained
5. By such person
6. Outside the State.

Title 18 U.S.C.922(a)(3)

The jury was charged that the essential elements of this crime were proof "that the firearm was actually transported from outside the State and into the State of New York, the Government

"must prove beyond a reasonable doubt that the accused, Chin, at the times mentioned was not a licensed importer, manufacturer, dealer or collector of firearms;

Two, that the firearm was transported into the State of New York in violation of 18 U.S.C. Section 922(a) (3); and

Three, that on or about the dates alleged in each count the defendant Chin knowingly received the said firearm.

When we use the term, "knowingly," we mean that the defendant must be aware of what he was doing in order to charge him criminally."

. . . .

"When we come to the question of receiving, the knowing receipt in the State of New York of a firearm that was transported into the State of New York, an individual is not chargeable with just receiving a firearm. The Government must prove that the defendant was aware that the firearm was transported into the State of New York from outside the State of New York.

Again, the Government does not have to prove that the defendant charged in this case, Chin, was aware that the receipt of that firearm transported into the State from outside violated the Federal Gun Control Act or that it was a violation of the section, pertinent section 922(a) (3).

Now, receipt means coming into possession of or getting or acquiring from a source outside oneself. In other words, in order to receive, somebody has to give it."

(A-90-92)

The essential elements recited by the Trial Court to the jury failed to define a crime in conformity with the statute. Completely omitted from the charge was the element that the person who received the weapon must be the same

person who obtained the weapon. In sharp contrast to the "receiving" sections found elsewhere in §922 (18 U.S.C. §922 (g)(j)(k)) and in the United States Code, 18 U.S.C. §641, 2311, et seq.), Congress has added an additional element to its definition of a crime under §922 (a)(3) -- that element being that the receipt must be by the person who obtained the firearm. The indictment, carefully tracking the wording of the statute, included the allegation that the weapon had been "obtained by them."

Having found, as a matter of law, that Young could not have transported and received the same weapon, the Court dismissed this Count as to her (Tr. 741). With reference to Chin, the Court completely omitted from its charge this essential element of the crime, and therefore this Count must be reversed because the jury's verdict did not incorporate an essential element. As the facts adduced in no way support a conviction under this section as properly defined, reversal of the conviction (and concomitant retrial) is not sufficient to cure the error. Therefore, the Count must be dismissed.

The jury was charged that the act of receiving in the state of residence a weapon obtained from another state is a crime. By placing in the statute the words "purchased or obtained by such person," Congress has limited the crime to those instances in which the person obtaining and receiving

are the same person. Although at first glance this might appear to create an anomaly within the statute, the Congressional history and intent of the statute indicate that the wording was utilized to prevent the mail-order acquisition of a weapon. The receipt, therefore, would be the receipt from the mails, or from an interstate carrier, of a weapon, purchased or obtained by the person receiving it from a source located outside of the state of residence.

The section under which defendant was indicted, 922(a)(3) was enacted to implement "the prohibition in section 922(a)(2)." U.S. Code Congress and Administrative News 1968, p. 4418 (90th Congress). Section 922(a)(2) seeks to eliminate the "inter-state mail-order shipments of firearms." U.S. Cong. and Ad. News, supra. The use of the word "receipt" is seen to be a counterpart of "deliver" in the preceding section. The tenor of the law and the reason for the inclusion of the words "purchased or obtained by such person" are shown to be specifically directed at mail-order or indirect acquisition situations. Although the receipt is not limited by the wording of the statute to receipt from the mail, the inclusion of the phrase "purchased or obtained by such person," viewed in relation to this intent, shows the specific purpose for which the phrase was used.

The conduct sought to be proscribed, therefore, is just as the statute indicates, receipt of a weapon by the person who obtained the weapon. Had Congress sought to prohibit receipt of a weapon transported by anyone in interstate commerce, the words "by such person" would have been omitted.

This statute, as any criminal statute (especially a *malum prohibitum* statute) must be strictly construed and any ambiguity must be resolved in favor of the accused.

United States v. Bass, 404 U.S. 336 92 S. Ct. 515, 30 L.Ed.2d 488 (1971). Viewed against these principles, it must be again concluded that Congress meant precisely what it said in restricting criminal liability to those who obtained the weapon outside the state and received it in their state of residence.

Even if the jury had been charged correctly, the conviction on this Count could not stand.

The evidence clearly shows that Chin could not have committed the crime of receipt of a weapon as defined in 922(a)(3). Once again, the evidence showed that Young obtained the weapon in California. The Court charged that the Government had not shown that Chin was in California (A-89a). Had Chin ever received the weapon, he could only have received it in New York. Failure to prove that he obtained

it outside of New York constitutes failure to prove this crime. The proof that Young obtained the firearm in California disproves this crime as charged against Chin.

Any attempt to uphold this conviction which relies upon the first Count, insofar as Chin was charged and convicted as an aider and abettor, is untenable. If the conviction for Count I is upheld, Chin would have been found to have aided and abetted in the transportation of the weapon. The Government position must then be that Chin was charged and convicted as a principal in the transportation and therefore stands in the shoes of the principal vis-a-vis this count. The fallacy in this reasoning is that the crime charged in Count I is the transportation and conviction for that count constitutes a finding that Chin aided in the transportation; it proves nothing with regard to circumstances surrounding the acquisition. Nothing can change the fact that Chin received the weapon, if at all, in New York. No proof in the record indicates that Chin obtained the weapon in California. It is legally impossible on these facts to hold that Chin committed the crime charged. Therefore, the conviction must be reversed and the count dismissed.

POINT III

THE TRIAL COURT ERRED IN ITS CHARGE DEFINING "RESIDENCE" AND AIDING AND ABETTING

Our system of justice requires "that the Court's instructions be clear, accurate, complete and comprehensible, particularly with respect to the essential elements of the alleged crime." United States v. Clark, 475 F. 2d 240 (2 Cir. 1973). In addition to the errors in the charge discussed above, the Trial Court mischarged the jury as to two additional, essential elements of the crimes alleged.

The Court charged that residence as contained in the statute constituted domicile (A-102). Although the sections of Title 18 do not define "residence," the regulations promulgated pursuant to these sections do define the state of residence as the state "where an individual regularly resides or maintains his home," and, more importantly, specifically states that a person can have more than one residence at a time. Title 27 CFR Part 178, §178.11. Although these regulations may not conclusively bind this Court, it is undeniable that the definition of residence as residence, rather than as domicile, comports with the intention of the statute and the regulations are meant to explain the statute to the general

public, of which Chin is a member.

Domicile is a legal concept which requires persons in our mobile society to create the legal fiction that they remain stationary. Although many people maintain only one residence, many others maintain two or more. Certain areas of law, such as estates and trusts and taxation, require that persons chose one place as their domicile. The choice of domicile among residences may reflect tax considerations, estate considerations or may merely be the reflection of one's actual mode of living. The fact remains that a person may spend more time at a secondary residence than he does at his domicile. The most important factor in distinguishing domicile from residence is the intent of the individual.

It is self-evident from the law of domicile that the determination of which residence is the domicile involves more than cursory examination. To hold that Congress intended to equate residence with domicile would be to place upon the firearms dealers the burden of ascertaining a prospective purchaser's domicile. To fail to do so would subject the firearms dealer to criminal prosecution. Title 18 U.S.C. §922(b)(3). The firearms transaction records, provided by the Bureau of Alcohol, Tobacco and Firearms, do not support

this intention. Firearms dealers are given the responsibility of ascertaining the legality of sales (A- 53). Reference is made in the instructions on the form supplied to dealers by the Government (A- 53) to the Code of Federal Regulations, which contains the definition of residence quoted infra. The front portion of the form requests the residence address of the transferee, providing one space for the response. The firearms dealer is clearly directed to ascertain residence, not domicile. Definition of residence as residence is therefore strongly indicated. Congress enacted these statutes to attempt to stem the tide of interstate traffic in firearms. As was pointed out earlier, one of the major purposes of this particular section (§922(a)(3)) was to regulate the interstate mail-order acquisition of weapons.

Cognizant of the rights and desires of hunters and other persons with legitimate interests in the acquisition of firearms, the legislators took care to draft these statutes very narrowly. One of the factors salient in the legislative history is the need for hunters to transport their firearms to the place where they hunt. It would be totally unrealistic to assume that any but the smallest minority of American citizens who hunt for sport or provisions are able to do so in their own backyards. Another reality of our lives is the

second home. Skiers have homes close to ski regions, sun-lovers buy condominiums in Florida, and affluent golfers obtain lodging at country-clubs adjoining golf courses. So too, do hunters acquire hunting cabins.

There was no evidence that Young and Chin had a hunting lodge, but there was evidence that Young had a secondary residence. The Government elicited from Young's father on cross-examination that under Chinese tradition an unmarried daughter's residence is always that of her parents. Young, said her father, came "home." (Tr.497). Had the jury been properly charged on the definition of residence, they could have found that Young, in fact, had two residences. Therefore, it was not a crime for her to transport the weapon from the state of her residence to the state of her other residence. The Government, itself, provided the evidence upon which Young could have been found to have resided in California.

The failure to correctly define the term "residence" cannot be said, therefore, to be harmless error, for the possibility exists that Young would have been acquitted upon the proper charge. If Young did not commit the crime, there was no crime to aid and abet, and Chin is likewise not guilty.

The Trial Court's explanation of the law applicable to aiding and abetting was confusing. Correctly stating that the only theory under which Chin could be guilty under the first count would be that he aided and abetted the crime of transportation (A-89a), the Court also told the jury

"On the other hand, if you find this situation, that the defendant Young was a resident of California at the time she transported a weapon into the State of New York -- and I make no finding that she transported any weapon into the State of New York -- that's for you to determine and you must determine whether the Government proved that beyond a reasonable doubt -- but assuming that you find that she transported a weapon into the State of New York and at that time she was a resident of California but at that time the defendant Chin was a resident of the State of New York and that he aided and abetted -- as I will define that later -- the transportation into the State of New York and that he received a weapon while he was a resident of the State of New York that was transported from outside the State, then the mere fact that you must find the defendant Young not guilty by reason of failure to prove residence does not exculpate Mr. Chin because he doesn't benefit by her non-residence." (A-89)

A person cannot aid and abet another to commit a crime unless it is shown that a crime has been committed.

If Young was not guilty of the crime, there was no crime committed. Therefore, Chin could not have aided or abetted the crime and is not guilty. Had the jury found that Young was a resident of California at the time she obtained the weapon, her subsequent transportation of the weapon into New York, whether concurrent with a change of residence or otherwise, there would be no crime. To charge the jury that Chin could still be found guilty under these facts was substantial error.

POINT IV

PURSUANT TO THE
F.R.App.P. 28(1)
CHIN JOINS WITH YOUNG
IN POINT I OF HER
BRIEF.

CONCLUSION

THE JUDGMENTS OF CONVICTION
FOR BOTH COUNTS MUST BE
VACATED AND THE COUNTS DISMISSED
FOR THE REASONS SET FORTH IN
POINTS I AND II, AND IV. IN
THE ALTERNATIVE, THE CONVICTIONS
MUST BE VACATED AND THE CASE
REMITTED FOR NEW TRIAL FOR THE
REASONS SET FORTH IN POINTS I-IV
HEREIN.

Dated: Brooklyn, New York
December 14, 1976

IRA D. LONDON
CAROL MELLOR, Of Counsel

Respectfully submitted,

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U.S. Court of Appeals 2nd Cir
U.S.

Index No.

- against -

Kenneth R. Chen et al,
Depts Appellate

Affidavit of Personal Service

STATE OF NEW YORK, COUNTY OF

SS.:

I, Kevin E. Thomas, being duly sworn, depose and say that deponent is not a party to the action, is over 18 years of age and resides at 1515 Macombs Road, Bronx, N.Y. 10452.

That on the 15th day of Dec 1976 at 225 Codman Place
Brooklyn
 upon

deponent served the annexed Brief
David Hager arg for
 the U.S. in this action by delivering a 2 true copy thereof to said individual personally. Deponent knew the person so served to be the person mentioned and described in said papers as the herein,

Sworn to before me, this 15th
 day of Dec 19 76

Kevin E Thomas

Print name beneath signature

KEVIN E. THOMAS

Beth A. Hirsch
 BETH A. HIRSH
 NOTARY PUBLIC, State of New York
 No. 40-4003200
 Qualified in Queens County
 Commission Expires March 30, 1978